IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT

JODHPUR.

JUDGMENT.

Manohar Singh vs. Amrit Lal

S.B. Civil Second Appeal No.68/1987 against the judgment and decree dated 5.1.1987 passed by the learned District Judge, Jodhpur in Civil Appeal No.7/1984.

Date of Judgment: April 10, 2006.

PRESENT
HON'BLE MR. PRAKASH TATIA,J.

Mr. J.R. Bhandari , for the appellant.
Mr. O.P. Pungalia, for the respondent.

BY THE COURT:

Heard learned counsel for the parties.

This appeal is against the judgment and decree of the first appellate court dated 5.1.1987 reversing the judgment and decree of the trial court dated 20.12.1983.

Brief facts of the case are that the plaintiff-appellant filed a suit for eviction of the defendant-respondent-tenant with the allegations that the suit property was let out to the defendant on 27.11.1965 on rent of Rs.40/- per month. The first ground for eviction was default in payment of rent by the tenant and the second was the ground that part

of the suit premises has been sub-let to one Paras Ram s/o Virumal on rent of Rs.60/- per month and Paras Ram put his cabin to run the betel shop. The defendant further sub-let the part of the shop to one Kailash s/o Manak Lal and he was permitted to run his tailoring shop in the suit shop. The plaintiff before filing the suit, gave notice to the defendant but the defendant refused to accept the notice. Then the plaintiff affixed the notice on the shop. Said notice was not replied by the defendant.

The defendant submitted written statement and denied the default in payment of the rent and submitted that the portion over which the *Pan* shop is there, that is run by the defendant himself and it has not been sub-let to Paras Ram. The defendant also stated that any portion of the shop has not been sub-let to Kailash but the defendant himself is doing his business. The issues were framed and the parties produced evidence. The relevant evidence for the purpose of deciding the issues of sub-letting was statement of the plaintiff himself and his witness PW-4 Jai Singh. In rebuttal, the defendant alone appeared in the witness-box. The trial court held the defendant-tenant defaulter in payment of rent but did not pass the eviction decree as it was the first default of the tenant in payment of the rent and the decree for eviction could not have been passed as the tenant was entitled for one benefit under the provisions of the Rajasthan Premises (Control of Rent and

Eviction) Act, 1950. The trial court held that the plaintiff fully proved the case of sub-letting and decreed the suit for eviction of the tenant by judgment and decree dated 20.12.1983. Being aggrieved against the said judgment and decree dated 20.12.1983, the defendant-tenant preferred regular first appeal. The appellate court reversed the judgment and decree of the trial court by the impugned judgment and decree dated 5.1.1987. Hence this second appeal.

The defendant also submitted cross-objection to challenge the finding of the courts below recorded on issue of default.

The appeal was admitted by this Court on 25.8.1987 but no substantial question of law was framed, therefore, on 14.2.2005, following substantial questions of law were framed by this Court:-

> *"(1) Whether the learned Appellate Court erred in reversing the finding of the trial court on the issue of sub-letting by ignoring the relevant consideration ?*
>
> *(2) Whether the two courts below erred in holding the defendant-tenant to be a defaulter within the meaning of Section 13(1)(a) of the Rajasthan Premises (Control of Rent and Eviction) Act, 1950 without considering the plea of and the evidence adduced by the defendant.?"*

According to the learned counsel for the appellant, the first appellate court committed serious error of law as the first appellate court failed to read the evidence of even defendant and ignored

important material fact that the plaintiff was not-cross examined by the defendant on the question of sub-letting and even if there are two three questions in relation to sub-letting, those questions were only formal questions and not questioning the statement of the plaintiff on the issue of sub-letting. It is also submitted that the evidence came on record from the statement of the defendant himself fully proving the case of sub-letting by the defendant. According to the learned counsel for the appellant, the trial court gave cogent reasons and relied upon the admission of defendant that Paras Ram occupies the part of the suit premises and that was the case of the plaintiff. The defendant's plea that Paras Ram was his servant, was not the fact pleaded. The trial court also considered the fact that the defendant had shop licence for running the tea-stall but did not produce any licence evidencing him as owner of the betel shop. In evidence of the defendant, it also has came that one Photo-studio was running. That was also a subsequent event and the court has ample jurisdiction to take note of subsequent event and grant relief accordingly. The defendant further admitted that he is not knowing the photography. All these facts have not been considered by the first appellate court. The appellate court committed serious error of law and allowed the appeal on the ground that the plaintiff did not produce the alleged sub-lettees as the plaintiff's witnesses. On this ground alone the finding of the first appellate court deserves to be set

aside.

The learned counsel for the respondent vehemently submitted that there is no direct evidence of sub-letting. There is only oral evidence of the plaintiff with respect to the plea of sub-letting and the plaintiff himself served the notice upon the defendant who was present in the shop according to the plaintiff's own case the plaintiff's case is contradicted by the plaintiff himself. The learned counsel for the appellant also submitted that the plaintiff failed to prove exclusive possession of the sub-tenant and Hon'ble the Apex Court also held that in case where exclusive possession of sub-tenant is not proved, the case of sub-tenancy cannot be presumed. It is also submitted that the plaintiff has also no knowledge about the facts, therefore, his evidence is of no help. The defendant rebutted the evidence of the plaintiff and there is oath against oath. In addition to above, the learned counsel for the respondent vehemently submitted that sub-letting is a question of fact and the first appellate court after appreciating the evidence, has decided the issue of sub-letting in favour of the defendant-tenant-respondent. Therefore, this finding cannot be interfered while exercising jurisdiction under Section 100,C.P.C.

I considered the submissions of the learned counsel for the parties and perused the record also.

The facts which cannot be disputed in the light of the statement

of the defendant also are that the suit shop was taken on rent by the defendant-tenant for running a tea-shop. He closed the tea-shop. The plaintiff alleged that on part of the suit-premises, a cabin has been put wherein betel-shop is being run. The plaintiff specifically stated that this betel-shop is being run by one Paras Ram. Paras Ram's presence in said shop is allowed by the defendant. The defendant in his written statement has not disclosed his any relation with said Paras Ram. The defendant's evidence that Paras Ram was defendant's servant, was rightly discarded by the trial court because of the reason that that was not the fact pleaded by the defendant despite plaintiff's naming Paras Ram in the plaint. Not only this, the defendant even did not state that Paras Ram himself is having any contractual relation of master and servant with the defendant. These important facts have not been considered by the first appellate court.

The first appellate court even went to the extent of holding that the landlord should have produced the alleged sub-lettees whereas if we go by the stand taken by the defendant in his statement then the defendant himself admitted that Paras Ram was his employee therefore, only the defendant could have produced the said Paras Ram in evidence. Mere saying that presently he is not working where said Paras Ram, is not sufficient and cannot be believed. There is not a single word about the efforts to trace Paras Ram in the defendant's evidence. By no

stretch of imagination, this burden could have been put upon the plaintiff to produce Paras Ram. Therefore, the approach of the first appellate court was absolutely perverse. That perversity vitiates the finding.

It will be worthwhile to mention here that the defendant admitted that he had shop licence for the tea-stall but he did not produce any licence for the betel-shop or for photo-studio. Subsequent to the filing of the suit, yet another business was started in the suit shop and that is of Photography. The defendant himself admitted that he has no knowledge of photography and one person Manohar is looking after the photography work. Said Manohar was also not produced by the defendant to prove that he is his servant or employee of the defendant. However, this subsequent event also has not been taken note by the first appellate court before reversing the finding of the trial court on the question of sub-letting.

The total facts which were clear from the record and the evidence are that originally the shop was taken on rent for running the tea-stall, which has been closed. The business changed and with the change of business, new person came in picture. In these circumstances, it was the heavy burden upon the defendant to prove that still it is not a case of sub-letting and the defendant has control and actual possession or even legal possession over the part of the suit shop which

is alleged to have been sub-let. The defendant did not produce any corroborative evidence and word of mouth of the defendant is not sufficient to rebut the plaintiff's evidence particularly when the defendant did not cross-examine the plaintiff on material point.

In view of the above, the finding of fact recorded by the first appellate court is vitiated on account of ignoring material and relevant facts and evidence. Consequently, substantial question of law no.1 is decided in favour of the appellant. The finding of the first appellate court on issue of sub-letting is set aside and the finding recorded by the trial court is upheld.

So far as the judgments relied upon by the learned counsel for the respondent are concerned, they are also required to be mentioned here only for the purpose that the respondent relies upon the settled proposition of law and they are not in dispute in any manner. In the question of sub-letting, initial burden lies upon the plaintiff but once that initial burden discharged, the onus shifts upon the defendant and some times as facts require, that onus is much heavier than the discharge of initial burden. In this case, the plaintiff's statement and particularly un-cross-examined statement on the issue of sub-letting, this was sufficient to discharge the plaintiff's burden but the defendant totally failed to discharge his onus. Therefore, the judgment relied upon by the learned counsel for the respondent in the cases of Kala and

another vs. Madho Prashad Vaidya ((1998) 6 SCC 573), Bhomle Ram vs. Mahesh Chand & anr. (1997(1) WLC(Raj.), M/s Delhi Stationers & Printers vs. Rajendra Kumar (JT 1990(1) SC 372), Benjamin Premanand Rawade (Dead) by Lrs. vs. Anil Joseph Rawade ((1998) 9 SCC 688) and Resham Singh vs. Raghbir Singh and another ((1999) 7 SCC 263) have no application to the facts of the present case.

The learned counsel for the respondent does not want to press the cross-objection, therefore, the substantial question of law no.2 does not survive.

Consequently, the appeal of the appellant is allowed and the judgment and decree of the first appellate court dated 5.1.1987 is set aside and the judgment and decree of the trial court dated 20.12.1983 is restored. However, the respondent-tenant is granted time to vacate the suit premises by 31.12.2006 on furnishing written undertaking before the trial court within one month that he shall hand-over vacant possession of the suit premises on or before 31.12.2006 to the appellant-landlord and shall not sub-let or part with possession of the suit premises to any person during this period and shall pay all the arrears of rent and decretal amount, if due, within a period of two months from today before the trial court or directly to the landlord, the decree under challenge shall not be executed till 31.12.2006. The tenant-respondent shall also deposit the rent month by month by 15th day of each

succeeding month of his tenancy in the trial court. In case of non-compliance of the order or default in payment of rent mentioned above, the decree shall become executable forthwith.

(**PRAKASH TATIA),J.**

mlt.